No. 81

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In the Supreme Court
of the United States
October Term, 1956

OTTAWA HUNTING ASSOCIATION, INC., a corporation, *Appellant*,

vs.

THE STATE OF KANSAS AND HAROLD R. FATZER, Attorney General of Kansas, and ROSS BEACH, JR., HOWARD M. GILLESPIE, CHARLES E. KAUP, VERN R. MAYO, HUGH MILLER and FRANK F. YOUNG, members of the Forestry, Fish & Game Commission of Kansas, and COLBURN C. HOLMES, PAUL KEITH and JOHN R. SMITH, Commissioners, *Appellees.*

On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

JOHN ANDERSON, JR.,
Attorney General
of the State of Kansas,
PAUL E. WILSON,
Assistant Attorney General
of the State of Kansas,
NOEL MULLENDORE,
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26-4255

INDEX

MOTION TO DISMISS OR AFFIRM:

	PAGE
The Constitutional Questions	4
The Questions Are Not Substantial	5
Conclusion	12

TABLE OF CASES AND STATUTES

CASES:

Hampton v. Arkansas Fish and Game Commission, 238 S. W. 2d 950	10
State v. Boicourt Hunting Association, 177 Kan. 637, 282 P. 2d 395	9

STATUTES:

Constitution of the United States, Fourteenth Amendment	4

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On Appeal from the Supreme Court of the State of Kansas

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss or affirm the above entitled appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

The Constitutional Questions

The appellant herein attempts to present certain questions alleged to arise under the Constitution of the United States. These questions as set out in the appellant's Jurisdictional Statements are as follows:

> "1. Whether the Forestry, Fish and Game Law of the State of Kansas, which authorizes administrative officials within their discretion to acquire private lands by condemnation proceedings for the establishment of public hunting and shooting grounds, is invalid on its face as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.
>
> "2. Whether under the Kansas Forestry, Fish and Game Law (as construed by the Supreme Court of the State of Kansas) the available judicial review of the action of the Kansas Forestry, Fish and Game Commission is so inadequate as to render the said Law invalid as repugnant to the due process guarantee contained in the Fourteenth Amendment to the Constitution of the United States.
>
> "3. Whether the statutory standards for the condemnation of private lands, as applied by the Kansas Forestry, Fish and Game Commission and affirmed by the Supreme Court of Kansas as a basis for acquiring the private lands of the appellant, are by that application given a construction so broad, vague and indefinite as to render the same standards and each of them invalid as repugnant to the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States.

"4. Whether the acquiring of appellant's lands by the State of Kansas, and in particular the Forestry, Fish and Game Commission of said state, through the exercise of the power of eminent domain for the purpose of devoting said lands of appellant to a private use as distinguished from a public use, constitutes a violation of the guarantee of due process contained in the Fourteenth Amendment to the Constitution of the United States."

The Questions Are Not Substantial

1. Appellant attempts to question the power of the Forestry, Fish and Game Commission of the State of Kansas to condemn lands for the establishment of "public hunting and shooting grounds." A review of this record will disclose that the power of condemnation is not here being invoked to acquire grounds for public shooting. Appellant seeks to inject into the case an issue not presented by the record. The purposes for which the lands in question are being acquired are fully set out in the resolution adopted by the Forestry, Fish and Game Commission on February 5, 1954, as follows:

"(1) For the purpose of establishing, providing, improving, keeping and maintaining of the area of approximately four thousand three hundred ninety-three and 09/100 (4393.09) acres, more or less, as a waterfowl, game and or fish refuge and sanctuary, recreational grounds and public forestry.

"(2) For the purpose of using part of said area

> for a service road, ditches and embankments for the establishing, providing, developing, improving and maintaining of said area as a game and/or fish refuge and sanctuary, recreational grounds and public forestry.
>
> "(3) For the purpose of protecting, adding to, improving and maintaining of the said area of thirty-six hundred seventy-nine (3679) acres, now acquired in the name of the State of Kansas, as a waterfowl, game and/or fish refuge and sanctuary, recreational grounds and public forestry."

A like purpose is alleged in the petition for condemnation filed before the District Judge of Linn County on April 6, 1954. It was the finding of the District Court of Linn County that the Commission was acting in good faith, within its authority conferred by law. (See Appendix B to Jurisdictional Statement, page 33.) Finally, the opinion of the Supreme Court of the State of Kansas would indicate that the primary purpose for which the lands are being taken was not the creation of a public shooting ground. Attention is respectfully drawn to the following comment of the Court, set out in Appendix A of the Jurisdictional Statement, at page 23:

> "Assuming, solely for the sake of argument, that duck hunting is a private use and purpose, the fact remains that when the over-all purpose, nature, size and character of the proposed project is taken into consideration, the conclusion is inescapable that the duck hunting here involved would amount to noth-

ing more than an *incidental* use of the entire project, rather than the *primary* use, notwithstanding the fact that in its *present* status and ownership duck hunting undoubtedly has been the *primary* use to which plaintiff's members have put the specific property. In *Smouse v. Kansas City S. Rly. Co.*, 129 Kan. 176, 282 Pac. 183, following the rule laid down in *Irrigation Co. v. Klein*, supra, it was said:

"'Appellant argues that this evidence discloses that a private use as well as a public use is to be made of this property and that this renders the condemnation proceeding unlawful. It is well settled, of course, that even when a party has the right of eminent domain he cannot condemn the private property of an individual for the private use of another who does not possess the right of eminent domain. It is also quite well settled that where both a public and a private use is to be made of the property sought to be condemned and the private use is the dominant, outstanding, the proceeding must fail, . . . But if the private use to be made of the property is inconsequential compared to the public use, or subordinate thereto to the extent that it can be said to be only an incident thereof, then the fact that such private use is to be made of the property will not defeat the condemnation.' (p. 186.)

"We think the rule there stated is very applicable to the situation before us. Furthermore, there is nothing in the case to indicate that regulated and limited hunting on a portion of the entire project is not entirely consistent with a program of conservation and propagation of migratory waterfowl. In fact, common everyday experience and knowledge tell us that the two are consistent."

Appellant's position here is the same that it has been throughout the litigation. That position is aptly described by the District Court as follows:

> "The theory of the plaintiff's cases is that the Commission did not mean what they resolved in their meetings and in their contracts with the Federal Agency but had the ulterior motive of taking the private hunting grounds of the plaintiff's from them and opening them up as public hunting grounds. Of course, if that were established, the same could not be done through the process of eminent domain. However, *the evidence did not bear out or warrant that argument.*" (Jurisdictional Statement, Appendix B, p. 34.) (Italics supplied.)

Appellant insists on ignoring the facts obvious to all others, and seek to litigate issues not in the case.

2. Appellant complains that neither the Constitution of the State of Kansas nor the legislative enactments of the state specifically give the appellant access to the courts to obtain judicial review of the acts of the Commission. The point cannot be well taken for the reason that in this very proceeding, appellant is in court and has had a judicial review of the discretionary acts of the Commission. The fact that the issue has been resolved against appellant does not detract from the availability of that review. We grant that under the Kansas statutes, as interpreted by the Supreme Court of the State, a condemnation proceeding is a

special statutory proceeding, and prior to taking an appeal from the award of the Commissioners, the provisions thereof neither contemplate nor comprehend the filing of pleadings challenging the validity of the condemnation proceedings. The effect of the statute, as interpreted by the Supreme Court, is that such a proceeding is not a judicial procedure prior to the making of an award and the taking of an appeal therefrom. However, the landowner is not without remedy to challenge the validity of such proceeding at any stage thereof. There is available to him common law and equitable remedies for the protection of his interests in the property sought to be condemned. He is not denied the right to go into a court at any stage of the proceeding and ask for injunctive relief challenging the right to take his property. (*State v. Boicourt Hunting Association*, 177 Kan. 637, 282 P. 2d 395.) The only inhibition is that he may not do so in the condemnation proceeding.

3. Appellant complains that the statutory standards for the condemnation of the private lands as applied by the Forestry, Fish and Game Commission are given construction so broad, vague and indefinite as to render such standards invalid as repugnant to the guarantee of due process contained in the Fourteenth Amendment. Again

appellant urges the point that the statute does not authorize the condemnation of public hunting grounds. Again we must point out that the power of eminent domain is not being exercised to condemn public hunting grounds. That issue was settled in the courts of Kansas. Moreover, we note that appellant appears to admit the validity of the statute for the purposes set out in the act. On pages 4 and 5 of the Jurisdictional Statement, the following statement occurs:

> "It is not the contention of appellant that the members of the Forestry, Fish and Game Commission of the State of Kansas may not condemn land for a proper purpose—but that they may not arrogate to themselves the power to establish public hunting grounds by means that have no sanction under the Kansas statute authorizing the exercise of the power of eminent domain by the Commission nor under the constitutions of the State of Kansas and of the United States."

This would appear to be a concession by appellant of the intrinsic validity of the statute. Mention is made of the appellant's conflict between the decision of the Arkansas Supreme Court in *Hampton v. Arkansas Fish and Game Commission*, 238 S. W. 2d 950. Appellee respectfully suggests that the two cases present vital points of distinction. The record in the Arkansas case reflected that the land sought to be taken was being condemned primarily and

foremost for the purpose of public hunting areas. In the instant case the record emphasizes that any hunting which may be permitted under conditions yet to be determined will be incidental to the primary purpose of maintaining a game refuge.

4. Complaint is made that the purpose for which the lands are here being taken constitutes a violation of the due process clause of the Fourteenth Amendment. Again we emphasize that the purpose for which these lands are being condemned is reflected by the record and not by the statements of the appellant. The primary purpose for which condemnation is instituted is to create a public game reserve and recreational area. Appellant cites no authority to support an argument that these are not proper public purposes.

CONCLUSION

For the reasons hereinbefore set forth, appellees respectfully urge that the within case should be dismissed or affirmed.

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PER

CURIAM

ported below: 194 Ohio St. 203, 125 N. E. 2d 401.

No. 81. OTTAWA HUNTING ASSOCIATION, INC., *v.* KANSAS ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *James C. Wilson* for appellant. *John Anderson, Jr.*, Attorney General of Kansas, *Paul E. Wilson*, Assistant Attorney General, and *Noel Mullendore*, Special Assistant Attorney General, for appellees. Reported below: 178 Kan. 460, 289 P. 2d 754.

No. 185. DULUTH, MISSABE & IRON RANGE RAILWAY